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MICHAEL RODAK, JR., C

Case No. 80-332

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

JAMES A. RHODES, et al.,

Petitioners,

vs.

KELLY CHAPMAN, et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

REPLY BRIEF
TO BRIEF IN OPPOSITION TO CERTIORARI

WILLIAM J. BROWN
Attorney General

ALLEN P. ADLER
Assistant Attorney General
State Office Tower, 26th Floor
30 East Broad Street
Columbus, Ohio 43215
(614) 466-5414
Counsel of Record

LEO J. CONWAY
Assistant Attorney General
Of Counsel
ATTORNEYS FOR PETITIONERS

MIDWEST LAW PRINTERS AND PUBLISHERS, INC., Columbus, Ohio 43216

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REPLY ARGUMENT IN SUPPORT OF CERTIORARI

The question posed by petitioners is:

> Whether the double celling of prison inmates constitutes cruel and unusual punishment where the record indicates that the practice does not deprive inmates of minimum constitutional guarantees to adequate food, clothing, shelter, sanitation, medical care and personal safety.

Respondents' brief in opposition to certiorari, in asserting that no conflict exists among the circuits, that no novel issue exists, and that a non important issue has been presented mistakes not only what issue is presented but what occurred in the district court below.

Initially, respondants suggest that the present case did not involve the issue of double celling as a practice in and of itself, but only as an incident to a larger issue of overcrowding. Thus, for example, respondents assert that petitioners seek authorization to continue overcrowding. (Respondents' brief, page 4). The issue in the case however has always been the legitimacy of double celling itself. The district court's opinion establishes this without question. In finding liability, the district court stated variously:

> It is our conclusion overly and on balance that the double celling at Lucasville is unconstitutional. (A 34);
>
> . . . this Court is not in any position to do aught but conclude and declare that double celling at Lucasville is federally unconstitutional. (A 37).

Moreover, in ordering relief, the district court stated:

> . . . the State must proceed with reasonable dispatch to formulate, propose, and carry out some plan which will terminate double celling. (A 37).

Reference to the record of this case simply establishes that questions as to the number of prisoners at the Southern Ohio Correctional Facility were incidental to the challenge to double celling and not the reverse. It is this fundamental distinction which causes respondents' mischaracterization of the standard employed by the district court.

Petitioners assert that the holding of the district court is a functional per se finding against double celling. While asserting that it utilized the "totality of circumstances approach" suggested by this Court, the district court failed to make the findings which are required to support such a holding. *Hutto v. Finney*, 437 U.S. 678, 687 (1978). Respondents cite an excerpt from *Bell v. Wolfish*, 441 U.S. 520, 543 (1979) (Respondents' brief, page 2), that confining a given number of people in a given amount of space in such a manner as to cause them to endure genuine privations and hardship over an extended period of time might raise serious questions under the due process clause. It is significant that nowhere in its opinion does the district court specifically find that double celling at the Southern Ohio Correctional Facility caused any inmate genuine privation or hardship.

Indeed, other than boldly asserting that the district court followed the correct standard, respondents do not elaborate on the alleged "intolerable conditions" at the Southern Ohio Correctional Facility. Instead, respondents continue to focus only on the number of prisoners in the institution, not on whether such prisoners have

been deprived of constitutional right.

That the district court did not follow either the approach suggested by this Court in *Bell v. Wolfish, supra* or the totality of circumstances approach of *Hutto v. Finney, supra,* is most clearly seen in the relief that the district court ordered. Respondents correctly point out that despite initially stating that he was finding double celling at the Southern Ohio Correctional Facility to be cruel and unusual punishment and ordering a plan to eliminate double celling, the district court ultimately ordered a plan which reduced the population at the Southern Ohio Correctional Facility but did not eliminate double celling. (A 41). Rather than undercutting the desirability of certiorari such confused relief enhances it. Petitioners whole view is that the district court decision is an ad hoc judgment unsupported by the record when judged by the appropriate tests.

Petitioners, of course, have not, in their petition, separately challenged the relief ordered by this district court upon a finding of liability. Instead petitioners have challenged the finding of liability itself. While if a finding of liability were justified, the failure of the district court to grant the least intrusive relief might be arguable, the national importance of this issue is whether prison populations may be limited by a "one man - one cell" standard. In light of the record in this case, certiorari should be granted to give definitive guidance to the courts below.

Respectfully submitted,

WILLIAM J. BROWN
Attorney General

ALLEN P. ADLER
Assistant Attorney General
State Office Tower, 26th Floor
30 East Broad Street
Columbus, Ohio 43215
(614) 466-5414
Counsel of Record

LEO J. CONWAY
Assistant Attorney General
Of Counsel

ATTORNEYS FOR PETITIONERS

CERTIFICATE OF SERVICE

I hereby certify that the requisite number of copies of the foregoing Reply Brief to Brief in Opposition to Certiorari have been served on respondents, Kelly Chapman, # 122-531, P.O. Box 45699, Lucasville, Ohio 45699 and Richard Jaworski, # 734304, River Junction Correctional Institute, P.O. Box 37, Chattahoochee, Florida, 32324 by forwarding such copies through the office of their counsel, Louis A. Jacobs, Ohio State University, College of Law, 1659 North High Street, Columbus, Ohio, 43210; Jean P. Kamp, Legal Aid Society of Columbus, 40 West Gay Street, Columbus, Ohio, 43215; Christopher D. Stanley, 611 Rockefeller Building, Cleveland, Ohio 44113; and Robert K. Handelman, 186 East Eleventh Avenue, Columbus, Ohio 43201, by United States mail, postage prepaid this _____ day of October, 1980. I further certify that all parties required to be served have been so served.

ALLEN P. ADLER
Assistant Attorney General